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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

AUG 28 1953

Clerk, Supreme Court, Utah

JACQUELINE HARDMAN,

Plaintiff and
Appellant,

v.

No. 7980

DONALD MATTHEWS and G. J.
MATTHEWS,

Defendants and
Respondents,

REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACQUELINE HARDMAN,

Plaintiff and
Appellant,

v.

DONALD MATTHEWS and C. J.:
MATTHEWS

Defendants and
Respondents, :

: Case No. 7980

REPLY BRIEF

STATEMENT OF POINTS

I. THE TRIAL COURT ERRED IN GRANTING A
DEFENDANTS' MOTION FOR A THIRD-PARTY ACTION.

(a) THIRD-PARTY PLAINTIFF'S PLEADINGS WILL
NOT SUPPORT A JUDGMENT AGAINST THIRD-PARTY
DEFENDANT UNLESS PLAINTIFF AMENDS HER
COMPLAINT.

(b) THIRD-PARTY PLAINTIFF CANNOT BASE
RECOVERY AS AGAINST THIRD-PARTY DEFENDANT
ON THE GROUNDS OF CONTRIBUTION OR INDEMNITY.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING A

(a) THIRD-PARTY PLAINTIFF'S PLEADINGS WILL NOT SUPPORT A JUDGMENT AGAINST THIRD-PARTY DEFENDANT UNLESS PLAINTIFF AMENDS HER COMPLAINT.

The essence of respondents' brief is stated at page 4 wherein they state: "The liability which respondents have attempted to set forth is one which would inure to the benefit of respondents in the event plaintiff secured judgment against them." Therefore, there must of necessity exist a substantive rule of law which gives Third-Party Plaintiff as against Third-Party Defendant a cause of action. The Appellant's complaint alleges only a cause of action against defendants and upon the ground of negligence. Rule 14 a, Utah Rules of Civil Procedure, state in part: "Before the service of his answer, a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a Third-Party Plaintiff, to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

There is an entirely different substantive

recover against the defendant than that which
al low
would/plaintiff to recover as against Third-
Party Defendants, the driver and owner of the
automobile. The "guest statute", §1-9-1, Utah
Code Annotated 1953, specifically provides that
a guest can recover as against the driver of an
automobile only when there has been a showing
that the driver was either intoxicated or guilty
of wilful misconduct. Assuming that the plain-
tiff proves her case of negligence as against
the defendant, and without plaintiff amending
her complaint, how could defendant recover from
Third-Party Defendant for "all or part of
plaintiff's claim against him." Plaintiff has
not alleged wilful misconduct or intoxication in
her pleadings. In other words, the Third-Party
Complaint will not support a judgment against
Third-Party Defendant without plaintiff amend-
ing her complaint as provided in the guest
statute and alleging either intoxication or wil-
ful misconduct. These are two entirely different
theories of recovery and defendant cannot force
plaintiff to sue on a different theory or against
different parties. See Point I Appellant's

(b) THIRD PARTY PLAINTIFF CANNOT BASE RECOVERY AS AGAINST THIRD-PARTY DEFENDANT ON THE GROUNDS OF CONTRIBUTION OR INDEMNITY

At page 4 of respondents' brief, the following appears:

"* * * why, that is the very thing. Respondents have undertaken to do when they alleged in the Third-Party Complaint a set of facts which were of such nature as to permit respondents to recoup by contribution, indemnity, liability over, or otherwise, from the Third-Party Defendants 'such sums as may be adjudged in this action against defendants and Third-Party Plaintiffs in favor of the Plaintiff' ".

With respect to the question of contribution which respondents allege as a ground for recovery in their brief, it should be noted that respondents Third-Party Complaint is not seeking contribution from Third-Party Defendants, but rather as seeking to have Third-Party Defendants reimburse them for any and all damages which plaintiff recovers against them.

However, with respect to the question of contribution, respondents cite the case of Culmer v. Wilson, 13 U 129, 140, 141, 44 P 833, as supporting the proposition that there is contribution between joint tortfeasors in a

proposition. The case of Culmer v. Wilson involved a question of agency. The court at page 141 stated:

" * * * Where a party makes a bona fide claim to property, as in this case, and seeks to obtain possession by legal process from a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting those bona fide rights; and if it is decided that such claim is invalid, or that the court has not jurisdiction in the eye of the law growing out of the mere relation of the perpetration of the wrong, the maxim of the law that there is no contribution among wrongdoers is not applied, and the law will imply an indemnity to such agent who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's directions, within the scope of his instructions and employment."

The decision in Culmer v. Wilson could not be applied to the facts in the present case. This court, in quoting from Judge Storey, states at page 140:

" * * * 'This rule,' said Judge Storey, 'is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not when the party is acting under the supposition of the innocence and propriety of the act, and the tort is one of construction and inference of law.'"

Again at page 140 the court states:

" * * * Where the act is not known to be

the officer are acting in good faith, in the assertion of what they believe to be their right under the law, an agreement to indemnify the officer will be valid, even though it should subsequently appear that they were not justified in doing the acts against the consequences of which the indemnity was given."

The prevailing authority in the United States is expressed in the American Law Institute Restatement - Restitution - Paragraph 102 -

Concurrent and Joint Negligence:

"Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury he became liable in tort to the third person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other."

Since there is no substantive rule^{of} law granting to defendant a cause of action against a joint tortfeasor in a negligence action, there would be no way in which the respondent could recover over, as against the Third-Party Defendant.

It is interesting to note Subparagraph (d) American Law Institute, Restatement, Sec. 102, Restitution:

"(d) A tortfeasor who cannot obtain restitution from the third party because of a section cannot obtain contribution by taking

person either before or after judgment against himself or the other tortfeasor."

What the respondents mean at page 4 of their brief where they state, "liability over, or otherwise," is not known to the appellant. However, one thing is certain, there does not exist and cannot exist a cause of action between the Third-Party Plaintiff and Third-Party Defendant on the basis of the Plaintiff's present pleadings.

The case of *Yap v. Ferguson*, 3 Fed Rules Decisions 166, as quoted in part at page 9 of respondents' brief, is not a situation comparable to the present case. That case was a situation wherein the defendant had failed to comply with the terms and conditions of the contract of sale and the warranty. It should be noted that the court specifically stated that where a substantive right to indemnification or contribution accrued, as to a defendant as against a third-party defendant, then the third-party action would be valid. Such is not the situation in the case at bar.

CONCLUSION

In conclusion, Appellant respectfully submits that judgment of the trial court should be reversed.

Respectfully submitted,

McCullough Boyce & McCullough
Attorneys for Appellant